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In the Supreme Court of the United States

MICHELLE K. LEE, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,
Petitioner,

v.

SIMON SHIAO TAM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PROFESSORS EDWARD LEE AND JAKE LINFORD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF PROFESSORS EDWARD LEE AND JAKE LINFORD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

Amici are law professors at institutions in the United States who have no personal interest in the case. Instead, they have expertise in trademark law and the First Amendment and have a professional interest in the development of the law in a way that is faithful to the Constitution, as well as to the Lanham Act's legitimate goals. *Amici* are:

Edward Lee
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Institutional affiliations are given for identification purposes only.

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[1] The parties consented to the filing of this brief. Written documentation of their consent is filed with the Clerk. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* made a monetary contribution intended to fund its preparation or submission. *Amici*'s institutional affiliations are noted for identification only.

SUMMARY OF ARGUMENT

"[O]ne man's vulgarity is another's lyric," this Court instructed in paying heed to the First Amendment's protection for offensive words. *Cohen v. California*, 403 U.S. 15, 25 (1971). "Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* This principle applies especially so here where the government's denial of federal rights is based on the government's own judgment of whether words offend. Section 2(a) of the Lanham Act's bar against registration of words that "may disparage" persons amounts to impermissible viewpoint discrimination in the limited public forum of the system of federal registration of trademarks. What's more, § 2(a)'s bar has favored, in operation, the views of some groups over others, thereby allowing some racial or other group slurs over others. This discriminatory treatment the First Amendment forbids.

ARGUMENT

SECTION 2(A) OF THE LANHAM ACT VIOLATES THE FIRST AMENDMENT

A. Government Denials of Registrations if the Government Finds the Trademark "May Disparage Persons" Constitutes Viewpoint Discrimination

The Lanham Act's prohibition of words that "may disparage" from federal trademark registration is viewpoint discrimination on its face and in operation.

1. The System of Federal Registration on the Principal Register Is a Limited Public Forum

The system of federal registration of trademarks on the principal register is a limited public forum. The federal government, through the Lanham Act, has reserved this trademark forum to "certain groups" (i.e., trademark owners) and to "discussion of certain topics" (i.e., claims of ownership and priority to trademarks). *Cf. Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (explaining "limited public forum" doctrine). Although the topic of this forum is narrow, it provides nonetheless the *only* way for trademark owners to put the entire United States on "constructive notice of the registrant's claim of ownership" to a registered trademark. 15 U.S.C. § 1072. And, since 1988, constructive notice has been supplemented by the Lanham Act's grant of constructive use based on the registration of a mark, "conferring a right of priority, nationwide in effect" to the registered trademark. *Id.* § 1057(c). This provision was meant to enhance the dissemination of trademark-related information: "[C]onstructive use, by according conditional rights to those that publicly disclose their marks, will encourage the earlier filing of applications to register trademarks and will foster trademark searching by all parties before they adopt and invest in new marks." Senate Judiciary Committee Report on S. 1883, S. Rep. No. 100-515, p. 30 (Sept. 15, 1988).

Federal registration thus operates like a national bulletin board for trademark owners to inform the public of their identity, address, the trademarks they

own for certain products or services, and when they first used their marks. *Cf. Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001), *cert. denied*, 534 U.S. 858 (2001) (designated public forum created where "university's bulletin boards are available for use by the public, including persons not affiliated with the university, 'to communicate with students and others at the University'"); Kerry L. Monroe, Note, *Purpose and Effects: Viewpoint Discriminatory Closure of a Designated Public Forum*, 44 U. MICH. J.L. REFORM 985, 988 (2011) ("For example, a school bulletin board may be limited to postings related to a particular academic subject taught at the school, say history. In that case, the bulletin board would be considered not just a designated public forum, but specifically a limited public forum.").

A registrant includes the following information in his application: (1) the trademark claimed and any drawing of it; (2) its first use in commerce; (3) the type of products or services for which the trademark is used; (4) that the person is "the owner of the mark sought to be registered"; (5) that "to the best of the verifier's knowledge and belief, the facts recited in the application are accurate"; (6) that "to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive"; and (7) any disclaimers limiting the scope of the trademark to be registered. *See* 15 U.S.C. §§ 1051(a), 1056(a).

These statements of the registrant are made not just to the Trademark Office, but also to the public. An application to register a mark is published if it appears to the examiner to be "entitled to registration," and "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register" may file an opposition before the Trademark Office. 15 U.S.C. §§ 1062(a), 1063(a). Once a trademark is registered on the principal register, the information above is published online.

For example, Bob Dylan has registered his name as a trademark (Reg. No. 2033295). Dylan's registration information, publicly accessible to all on the Trademark Office website, is shown in Figure 1:

Figure 1. Public Information of Bob Dylan's Registration

Word Mark	BOB DYLAN
Goods and Services	IC 009. US 021 023 026 036 038. G & S: sound recordings, namely phonographic records featuring music recordings, prerecorded tape cartridges and cartridges featuring music recordings, prerecorded video cassettes featuring musical recordings, and prerecorded optical discs featuring music recordings, computer software stored on CD-ROM and magnetic media, namely, a multimedia interactive database of information and activities in the fields of [illegible] music, photographs and biographies of famous persons. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19620000 IC 016. US 002 005 022 023 029 037 038 050. G & S: printed publications, namely books, sheet music, and music folios. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19620000 IC 041. US 100 101 107. G & S: entertainment services, namely public performances by a musical and vocal artist. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19620000
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	74588451
Filing Date	October 17, 1994
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	November 5, 1996
Registration Number	2033295
Registration Date	January 28, 1997
Owner	(REGISTRANT) Dylan, Bob INDIVIDUAL UNITED STATES P.O. Box 853 Cooper Station New York City NEW YORK 10276-0853
Attorney of Record	Claudia M. Barrett
Type of Mark	TRADEMARK. SERVICE MARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20160406
Renewal	2ND RENEWAL 20160406
Live/Dead Indicator	LIVE

The speech contained in this registration goes beyond the trademark BOB DYLAN to include important factual information, including the name and address of the owner, any attorney of record, the nature of the goods or services for which the trademark is claimed, any drawings, and the date of first use of the mark in commerce. This information is valuable to not only the trademark owner, but also members of the public who might be interested in licensing the mark or determining if the mark is already registered. Although this trademark-related information is relatively brief, this Court has recognized that even brief information (as few as 30 words from organizations merely to identify themselves for future solicitation of funds) constitutes protected speech. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 790-91, 799 (1985).

The speech element of federal registration is facilitated by the Lanham Act's expansive view of what can constitute a trademark ("any word, name, symbol, or device, or any combination thereof used by a person ... to identify and distinguish his or her goods, ... and to indicate the source of the goods, even if that source is unknown"). 15 U.S.C. § 1127; *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 162 (1995) ("Since human beings might use as a 'symbol' or 'device' almost anything at all that is capable of carrying meaning, this language, read literally, is not restrictive."). Indeed, nearly every word can be used in a way to create a trademark. The Lanham Act even helps to incentivize the creation of new words, as well as new meanings of existing words. *See* William M. Landes & Richard A. Posner,

Trademark Law: An Economic Perspective, 30 J.L. & ECON. 265, 271 (1987).

Moreover, trademarks are often a form of expression of personal identity. *See* Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1413 (2005); Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 444-45 (2011) ("both personal names and trademarks ultimately serve the same function: to identify a person or thing, to distinguish that person or thing from others, and, relatedly, to act as a vehicle for certain intended or unintended associations about the individual, company, good, or service").

That is especially so where, as here, the trademark identifies people, not products. A band's name is a part of its identity, the way for it to be discovered and become established among music fans. Federal registration of that name is vital to securing a national scope for a band's name and identity. Through federal registration, a band, just as with any business, can announce to the entire nation: "This MARK is who I am." Not surprisingly, countless musicians have obtained federal registration. To name a few: Bob Dylan, Jimi Hendrix, Elvis Presley, The Beatles, The Rolling Stones, Michael Jackson, N.W.A., Rihanna, Whitney Houston, Katy Perry, and Adele. *See* Appendix A; JIMI HENDRIX (Reg. No. 2902769). As shown in Appendix A, our survey of the top 50 artists (based on certified sales from the List of best-selling music artists, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_best-selling_music_artists) (all websites cited herein last visited Dec. 14, 2016) indicates that

only 8 of the 50 artists do not have federal registrations of their names. *See* Appendix A (no registrations for Madonna, Elton John, Queen, Eagles, Phil Collins, Lil Wayne, Rod Stewart, and Julio Iglesias). All the other artists on the Top 50 list have federally registered marks—in many cases, multiple registrations—of their names or bands' names. *Id.* And, except for Queen and Eagles, all of the top group bands with fanciful names instead of personal names have federal registrations of their bands' names. *Id.* The Slants ask only for the same treatment.

The limited public forum embodied by the system of federal registration is shown by (i) the openness of federal registration to *all* valid trademark owners and (ii) the openness of the federal registry as a means of disseminating information to the public. *Cf. Cornelius*, 473 U.S. at 802 (for limited public forum, court examines "policy and practice of the government" and "the nature of the property and its compatibility with expressive activity"). Here, any member of the public who owns a valid trademark may post her ownership information in this public forum (embodied in registration on the principal register), and the entire public may access that information.

Given the relative ease by which any person can create a new trademark based on use (either before or after filing for a trademark, *see* 15 U.S.C. § 1051(a), (b)), it is no exaggeration to say that federal registration is potentially available to all. All it takes is coming up with a new trademark. In 2016, over 300,000 trademarks were registered. *See* USPTO, Trademarks Dashboard, Fourth Quarter FY 2016, At a Glance, https://www.uspto.gov/dashboards/trade

marks/main.dashxml. And, of course, the government itself does not play any role in the design of the registered trademarks, much less own them. *Cf. Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015) (finding no limited public forum in state specialty license plates because state had "final authority" over design and ultimate "ownership").

Likewise, unlike a state's confidential database of license plates or an internal mailbox system of a public school, the principal register of trademarks is accessible to the public—indeed, the entire world—at the searchable website of the Trademark Office. *See* Trademark Electronic Search System (TESS), www.uspto.gov/trademarks-application-process/ search-trademark-database. Indeed, the whole point of the online federal registry is for trademark holders to announce—or express—to the nation and the world their claim of ownership to certain trademarks in the United States.

Except for § 2(a)'s bar against disparaging marks and its bar against "immoral ... or scandalous matter," Section 2(a) takes a very broad permissive approach to allowing *all* trademarks to be registered ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature...") unless they are not valid as source identifiers (e.g., merely descriptive terms, functional, lack priority) or fail for concerns of deception, interference with existing trademarks or geographical indications, consumer confusion, dilution, or unfair competition. *See* 15 U.S.C. § 1052. These

valid trademark-related reasons are recognized in the Lanham Act's statement of Congress's intent. *Id.* §1127 ("The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.").

The government's suggestion (U.S. Br. 24 n.7) that § 2(a) might be justified by a treaty is mistaken. Both treaties cited by the government merely give members the discretion to deny registrations for reasons of public order; neither treaty requires it. *See* General Inter-American Convention for Trade Mark and Commercial Protection, Feb. 20, 1929, Art. 3(4), 46 Stat. 2916, T.S. No. 833; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, Art. 6, 25 Stat. 1376. A comparable provision in the Berne Convention (of which the U.S. is a member) recognizes discretion for countries to censor copyrighted works. Berne Convention for the Protection of Artistic and Literary Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, art. 17. Of course, that does not mean the United States can rely on Berne to justify censorship.

2. Section 2(a)'s Viewpoint Discrimination

Of course, not every trademark owner is entitled to federal registration on the principal register—or to access the limited public forum embodied in federal registration. In the Lanham Act, the government has, as it may under the First Amendment, "confine[d] a forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. This kind of limitation is what defines a limited public forum. It is, by definition, not as open as a traditional public forum.

Although this Court's precedents have sometimes used "limited" in describing both a designated public forum (the second type in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 n.7 (1983)) and a more limited public forum (*id.* at 47 (rejecting association's claim for "limited public forum"); *Good News Club v. Milford Central School*, 533 U.S. 96, 106 (2001); *Rosenberger*, 515 U.S. at 829; *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)), the Court should take the latter approach and apply the limited public forum doctrine from *Good News Club* and *Rosenberger* to this case.[2] The system of

[2] A limited public forum falls in between a designated public forum (which is equivalent to a traditional public forum in that both are generally open to the public) and a nonpublic forum, which need not contain an expressive purpose. This category of limited public forum as articulated in *Good News Club* and *Rosenberger* is helpful because some forums may be open to a segment of the public, but not generally to the entire public. To characterize such forums as "nonpublic" would be inaccurate. For example, the *Good News Club* Court held that a limited public forum was created by a school district's policy to allow

federal registration is a limited public forum that should be subject to reasonable restrictions of speech and viewpoint neutrality. In any event, even nonpublic forums (the third type in *Perry*, 460 U.S. at 46) are subject to the same scrutiny for reasonable restrictions and viewpoint neutrality. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998). Thus, even if the system of registration of trademarks on the principal register is considered a nonpublic forum, it should be subject to the same scrutiny as outlined above.

Here, Section 2(a)'s bar of words that may disparage people constitutes viewpoint discrimination under the limited public forum doctrine of *Good News Club* and *Rosenberger*. Section 2(a)'s bar against marks that "may disparage ... persons" has no legitimate trademark purpose. It does not protect source-identification or consumers from confusion, deception, or unfair competition. Instead, § 2(a) attempts to shield the public from putatively disparaging views of people. Such viewpoint discrimination the First Amendment forbids—whatever the type of fo-

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[Footnote continued from previous page]

district residents to use the school facilities for certain events that were open to the public. *Good News Club*, 533 U.S. at 103. Likewise, in *Rosenberger*, this Court held that a state university's policy to fund student extracurricular activities constituted a limited public forum. *Rosenberger*, 515 U.S. at 829-30. Although a limited public forum and nonpublic forum are subject to the same First Amendment tests of reasonableness and viewpoint neutrality, the test of reasonableness may be applied differently depending on how public (or not) the forum is. A restriction that is reasonable for a nonpublic forum may not necessarily be reasonable for a limited public forum, given its public nature.

rum. *See Good News Club*, 533 U.S. at 106-07 (no viewpoint discrimination for limited public forum); *Cornelius*, 473 U.S. at 800 (no viewpoint discrimination for nonpublic forum).

Section 2(a)'s viewpoint discrimination is manifest. The Trademark Office denies registration of a mark if it believes the meaning of a term may disparage persons. The Trademark Office grants the registration if it believes the meaning of the term does not disparage persons. In short, § 2(a) discriminates against disparaging views taken of people: disparaging terms are barred, while non-disparaging terms are favored. Banning disparaging marks from registration is just as much viewpoint discrimination as would be banning religious marks from registration. *Cf. Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (viewpoint discrimination through denial of use of school facilities to show religious films); *Rosenberger*, 515 U.S. at 831 (viewpoint discrimination through denial of funds to journal with religious editorial views); *Good News Club*, 533 U.S. at 107 (viewpoint discrimination through denial of use of school facilities after hours for religious purpose). Nor would such a ban on religious marks be excused if the restriction were determined based on the government's assessment of whether the content was religious in context, including by consideration of dictionary definitions and a substantial composite of the public's reaction. Viewpoint discrimination arises if the government favors one view over another in a restriction of speech—e.g., favoring nonreligious views over religious views, or positive views over disparaging views. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S.

789, 804 (1984) ("The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *accord Cornelius*, 508 U.S. at 394. That is what happened here.

And it is simply no answer for the government to assert that Tam's band can still enforce an unregistered trademark and use THE SLANTS as its name. U.S. Br. 26-27. By that reasoning, the school district in *Good News Club* could have excluded the religious group from the school's limited public forum as long as the religious group could meet elsewhere, such as on private property. But the whole point of viewpoint neutrality is to place a check on the government favoring certain views. The availability of private forums for speech does not cure the government's viewpoint discrimination. And, here, there is simply no practical substitute for informing the public of an entity's ownership of a national trademark except by inclusion on the federal registry.

In practical operation, the Trademark Office has applied § 2(a) in a way that favors some groups of people, but not others, as the list of registrations below shows:

(1) TACO HEADS (Reg. No. 5006995). *See* GREEN'S DICTIONARY OF SLANG, https://greensdictofslang.com/search/basic?q=taco+head ("taco head": "a derog. term for a Mexican or a Chicano"); List of ethnic slurs, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_ethnic_slurs#T ("Tacohead ... a Mexican person").

(2) COON POP (Reg. No. 5059018). *See* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/coon ("coon": "2. offensive — used as an insulting and contemptuous term for a black person"); GREEN'S DICTIONARY OF SLANG, https://greensdictofslang.com/search/basic?q=coon ("coon": "a highly derog. term for a black person"); List of ethnic slurs, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_ethnic_slurs#C ("coon": "(US, UK) a black person. Possibly from Portuguese barracão or Spanish barracón, a large building constructed to hold merchandise, where slaves were kept for sale, anglicised to barracoon (1837)").

(3) TAR BABY (Reg. No. 0614004, expired). *See* OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/197754?redirectedFrom=tar+baby#eid19291859 ("tar baby": "(b) a derog. term for a black person (U.S.) or a Maori (N.Z.)").

(4) MACACA (Reg. No. 4799771). *See* List of ethnic slurs, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_ethnic_slurs#M ("macaca": "originally used by francophone colonists in North Africa, also used in Europe as derogatory term against Immigrants from Africa").

(5) THE REDSKINS (Reg. No. 0836122); WASHINGTON REDSKINS (Reg. Nos. 0978824, 0986668); REDSKINS (Reg. No. 1085092); REDSKIN (Reg. No. 218639). *See* MERRIAM-WEBSTER DICTIONARY, https://www.merriamwebster.com/dictionary/redskin ("redskin": "usually offensive: American Indian"); DICTIONARY.COM, http://www.dictionary.com/browse/redskin ("redskin":

"Older Slang: Disparaging and Offensive. 1.a contemptuous term used to refer to a North American Indian."); *but see Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015) (affirming TTAB's cancellation of REDSKINS registration under "may disparage" bar), *on appeal*, (4th Cir.) (No. 15-1874).

(6) SQUAW (Reg. No. 3322061); SQUAW VALLEY (Reg. Nos. 4934959, 4704112, 4411257, 0670261); SQUAW VALLEY USA (Reg. Nos. 2269300, 2115036, 1645155, 1628589); SQUAW CREEK (Reg. No. 2049234); SQUAW ONE (Reg. No. 3322062); RESORT AT SQUAW CREEK (Reg. No. 3454778). *See* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/squaw ("squaw": "usually offensive: an American Indian woman"); DICTIONARY.COM, http://www.dictionary.com/browse/squaw?s=t ("squaw": "Older Use: Disparaging and Offensive. a contemptuous term used to refer to a North American Indian woman, especially a wife."); *see also In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264 (T.T.A.B. June 2, 2006) (denial of registration of SQUAW and SQUAW ONE as disparaging under § 2(a) for clothing and sporting goods services, but allowing registration for "skis, ski poles, ski bindings, ski tuning kits comprised of waxes and adjustment tools, ski equipment, namely, power cords").

(7) WHITE TRASH (Reg. No. 3849437); POOR WHITE TRASH PRODUCTIONS (Reg. No. 5021354); MAD MAXS WHITE TRASH BASH (Reg. No. 4821790); WHITE TRASH REBEL (Reg. No. 4687136); WHITE TRASH REPAIRS (Reg. No. 4022732); SUSIE'S WHITE TRASH (Reg. No.

4656958); UPPER WHITE TRASH (Reg. No. 4649626); ETTA MAY'S WHITE TRASH DIARY (Reg. No. 4156905); WHITE TRASH ROYALTY (Reg. No. 4177307); WHITE TRASH RACIN (Reg. No. 3761237); WHITE TRASH BEAUTIFUL (Reg. No. 4009982); AUTHENTIC WHITE TRASH (Reg. No. 4071200). *See* GREEN'S DICTIONARY OF SLANG, https://greensdictofslang.com/search/basic?q=white+trash ("white trash": "a derog. term for the poor white population of the Southern states; thus extended to non-US contexts"); OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/421005?redirectedFrom=white+trash#eid ("white trash": "orig. and chiefly U.S. colloq. (derogatory) ... Poor white people of low social status, esp. when regarded as uneducated or uncultured; (also) people who are perceived as having the values or attitudes associated with such a group...."); List of ethnic slurs, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_ethnic_slurs#W ("white trash": (US) poor white people. Common usage from the 1830s as a pejorative used by black house slaves against white servants").

(8) HILLBILLY ROCKSTARZ (Reg. No. 4726546); HILLBILLY HAND SCRUB JUST A SKIRT'LL DO YA' (Reg. No. 4583548); HILLBILLY HOUSE BUYERS (Reg. No. 4587689); HILLBILLY (Reg. No. 4599091); HILLBILLY HORROW SHOW (Reg. No. 4604966); HUNGRY HILLBILLY'S (Reg. No. 4663070); ROUND HILLBILLY (Reg. No. 4736422); SUP'D UP HILLBILLY (Reg. No. 4780679); HOLLYWOOD HILLBILLIES (Reg. No. 4796075); ROUND HILLBILLY (Reg. No. 4856414); THE HEBREW HILLBILLY: FIFTY SHADES OF OY VEY (Reg. No. 4884385); HILLBILLY WILLYS (Reg.

No. 4945787); HILLBILLY FOOTWASH (Reg. No. 4968222); HILLBILLY (Reg. Nos. 4639800, 45599091); HILLBILLY DELUXE (Reg. No. 5005004); HILLBILLY BOURBON (Reg. No. 5013302); HILLBILLY WHISKEY (Reg. No. 5059868). *See* COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/dictionary/english/hillbilly ("hillbilly": "usually derogatory an unsophisticated person, esp from the mountainous areas in the southeastern US"); THE DICTIONARY OF AMERICAN SLANG (Kipfer and Chapman eds., 4th ed. 2007) ("hillbilly": "(1) A southern Appalachian hill dweller •Regarded as offensive by some (1900+)"), *available at* http://www.dictionary.com/browse/hill billy.

(9) REDNECK RIVIERA (Reg. Nos. 5013306, 4813370, 4805587, 4790900, 4770464, 4809070, 4653408, 4168228, 3962132); RR REDNECK RIVIERA (Reg. Nos. 5013307, 4748412, 4769115, 4791126, 4951700); REDNECK BOOT SANDALS (Reg. No. 5015921); THE REDNECK MAGICIAN (Reg. No. 5063221); REDNECK EXPRESS PARTY BUS SERVICE (Reg. No. 5080930); REDNECK CARD REVOKED (Reg. No. 5094705); GREAT SCOTTS HOME OF THE REDNECK SUP! (Reg. No. 5094048). *See* GREEN'S DICTIONARY OF SLANG, https://greensdictofslang.com/search/basic?q=redneck ("redneck": "a derog. term for a country dweller, a peasant, esp. a southern US poor farmer who is stupid and racist; strictly rednecks came from swampy areas while hillbillies, their peers, came from the mountains [their sunburn; orig. a Presbyterian, then transferred to all poor whites]"); MERRIAM-WEBSTER DICTIONARY, https://www.merriamwebster.com/dictionary/redneck ("redneck": "(1) sometimes disparag-

ing: a white member of the Southern rural laboring class; (2) often disparaging : a person whose behavior and opinions are similar to those attributed to rednecks"); OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/160404?redirectedFrom=redneck#eid ("red neck": "3. orig. N. Amer. (usu. derogatory). Originally: a poorly educated white person working as an agricultural labourer or from a rural area in the southern United States, typically considered as holding bigoted or reactionary attitudes..."); List of ethnic slurs, WIKIPEDIA https://en.wikipedia.org/wiki/List_of_ethnic_slurs#R ("red neck": "(US) Southern laborer-class whites").

(10) DAGO SWAGG (Reg. No. 4347624). *See* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/dago ("dago": "*offensive* — used as an insulting and contemptuous term for a person of Italian or Spanish birth or descent"); OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/46892?redirectedFrom=dago#eid ("dago": "A name originally given in the south-western section of the United States to a man of Spanish parentage; now extended to include Spanish, Portuguese, and Italian people in general, or as a disparaging term for any foreigner.").

(11) CRACKA AZZ SKATEBOARDS (Reg. No. 1589729). *See* COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/dictionary/english/cracka ("cracka": "US derogatory a variant spelling of cracker" [meaning "poor White"]); List of ethnic slurs, WIKIPEDIA https://en.wikipedia.org/wiki/List_of_ethnic_slurs#C ("cracker": "(US) a poor Appalachian or poor Southerner, a white person, first used in

the 19th century....Also used in a more general sense in North America to refer to white people disparagingly.").

The Trademark Office's viewpoint discrimination is even clearer in how it has allowed some groups to "reclaim" an offensive term by registration, but denying reclaiming by Simon Shiao Tam and his band in this case:

(12) QUEER STUFF ENTERPRISES, INC. PROMOTING ALL THINGS NORMALLY QUEER AND QUEERLY NORMAL (Reg. No. 3092422); CAPITAL QUEER PROM (Reg. No. 3893904); QUEER OR STRAIGHT? (Reg. No. 4298676); QUEERKAT (Reg. No. 4186417); THE QUEER COMMONS (Reg. No. 4201675); QUEERFINITY (Reg. No. 4463235); A CONCOCTION OF ALL THINGS QUEER, CULTURE, AND CURRENT (Reg. No. 4462433); QUEER BOIS (Reg. No. 4510083); QUEERCRAFT (Reg. No. 4620679); QUEER PAL FOR THE STRAIGHT GAL (Reg. No. 4699581); QUEER FOLK, (Reg. No. 4742269); FROM QUEER TO ETERNITY (Reg. No. 4765714); LOVE IS QUEER (Reg. No. 4568331). *See* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com /dictionary/queer ("queer": "d (1) often disparaging : homosexual (2) sometimes offensive : gay"); DICTIONARY.COM, http://www.dictionary.com/ browse/ queer?s=t ("queer": "Slang. Usually Disparaging and Offensive. (of a person) gay or lesbian."); Marissa Higgins, *Is the Word "Queer" Offensive? Here's a Look at Its History in the LBTQA+ Community*, BUSTLE, Feb. 4, 2016, https://www.bustle.com/articles/

139727-is-the-word-queer-offensive-heres-a-look-at-its-history-in-the-lgbtqa-community ("This movement to reclaim 'queer' started in the 1980s and has become progressively more popular in the decades since, though it's still a divisive concept.").

(13) DYKES ON BIKES (Reg. No. 3323803); DYKE NIGHT (Reg. No. 4146588); VELVET PARK DYKE CULTURE IN BLOOM (Reg. No. 3128707). *See* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dic tionary/ dykes ("dyke": "often disparaging: lesbian"); DICTIONARY.COM, http://www.dictionary.com/browse/ dyke?s=t ("dyke": "Slang: Disparaging and Offensive.1. a contemptuous term used to refer to a lesbian.").

(14) N.W.A. (acronym for Niggaz Wit Attitudes) (Reg. No. 2522163). *See* DICTIONARY.COM, http://www.dictionary.com/browse/nigga ("Nigga is used mainly among African Americans, but also among other minorities and ethnicities, in a neutral or familiar way and as a friendly term of address....However, nigga is taken to be extremely offensive when used by outsiders. Many people consider this word to be equally as offensive as nigger.").

As the federal registrations above show, whether § 2(a) bars registration apparently "depend[s] on the identity of the person or group that the mark disparages," to borrow the Solicitor General's description of viewpoint discrimination. *Cf.* U.S. Br. 46.

Tam was denied federal registration because the Trademark Office found that his mark "may disparage" people of Asian or Asian American descent. Yet,

as shown above, the Trademark Office has allowed numerous federal registrations to other marks that also "may disparage" other (non-Asian) groups, including registrations by the musical groups N.W.A. and HILLBILLY ROCKSTARZ. *See also* Emily M. Kustina, *Discriminatory Discretion: PTO Procedures and Viewpoint Discrimination Under Section 2(a) of the Lanham Act*, 164 U. PA. L. REV. 513, 559 (2016) (compiling in Table 2 survey of Trademark Office decisions on trademarks using following terms: "chink," "dyke," "fag," "faggot," "hebe," "heeb," "jap," "nigga," "nigger," "queer," "redskin," "slant," "squaw"); *id.* (indicating numerous federal registrations involving "dyke," "fag," "hebe," "queer," "redskin," "slant," and "squaw").

As such, the Trademark Office practice creates a "significant danger that 'favored' private viewpoints will be furthered" at the expense of disfavored viewpoints of other groups. *Cf.* U.S. Br. 46. Both facially and in operation §2(a) violates the First Amendment. *See generally R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (finding city "hate speech" law constituted viewpoint discrimination in operation); *accord Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) ("'In its practical operation,' Vermont's law 'goes even beyond mere content discrimination, to actual viewpoint discrimination.'") (quoting *R.A.V.*, 505 U.S. at 391).

3. The Reasonable Restrictions of Trademark Ownership in the Lanham Act

Almost all of the other Lanham Act's restrictions are "'reasonable in light of the purpose served by the

forum.'" *Good News Club*, 533 U.S. at 107 (quoting *Rosenberger*, 515 U.S. at 829); *see also Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting) (applying same approach to state license plates). As this Court recognized, "The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers. See S. Rep. No. 1333, at 3, 5. National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985).

Most of the requirements of § 2 of the Lanham Act are reasonable in light of the legitimate trademark purposes in protecting source-identification of trademarks and in avoiding registration of marks that could lead to consumer confusion with other marks, various forms of deception and false information to consumers, misappropriation, unfair competition, dilution of famous marks, or inappropriate extension of trademarks to functional elements. *See* 15 U.S.C. § 1052(a), (b), (c), (d), and (e).

Accordingly, contrary to the argument of *Amici Curiae* Law Professors in Support of Petitioner, scrutinizing § 2(a)'s disparagement bar will not put in jeopardy "numerous provisions of the Trademark Act." Brief of Law Professors as *Amici Curiae* in Supp. of Pet. 1. Nearly all of the Lanham Act's restrictions are both viewpoint neutral and reasonable to trademark's purposes. Besides § 2(a)'s disparage-

ment bar, the only other provision that appears susceptible to concerns for viewpoint discrimination is § 2(a)'s bar of "immoral ... or scandalous" marks. *See* Megan M. Carpenter & Mary Garner, *NSFW: An Empirical Study of Scandalous Trademarks*, 33 CARDOZO ARTS & ENT. L.J. 321, 332-34 (2015) (study of 232 Trademark Office decisions based on scandalousness that showed inconsistent use of dictionaries and context); Megan M. Carpenter & Kathryn T. Murphy, *Calling Bulls**t on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks*, 49 U. LOUISVILLE L. REV. 465, 468-74 (2011) (criticizing Trademark Office's lack of standards and evidence in applying scandalousness bar); Regan Smith, Note, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L. REV. 451, 471 (2007) (discussing possible viewpoint discrimination of scandalousness bar). However, this issue is not before the Court and should await a future controversy.

In any event, the limited public forum doctrine of *Good News Club* and *Rosenberger* will not expose the Lanham Act to First Amendment scrutiny beyond reasonableness and viewpoint neutrality—an approach consonant with trademark law's own development of internal First Amendment safeguards through the common law and legislation, as well as this Court's general approach to copyright law. *Cf.* Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 189-95 (2004) (contending that trademark law internalizes free speech accommodations through common law development); *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2002) (copyright law is not categorically immune from First

Amendment scrutiny, but "copyright's built-in free speech safeguards are generally adequate to address" speech concerns).

B. Federal Registration Is Not a Government Subsidy, Government Funding, or Government Speech

Section 2(a)'s viewpoint discrimination is not saved by attempts to shield it from any First Amendment scrutiny. Trademark registration is not a government subsidy or funding. It is exactly the opposite. Registrants pay between $225 to $325 per registration and $400 for maintenance fees each decade to the federal government, which raises substantial revenues from the registrations. *See* USPTO, Trademark Application Fee Structure, https://www.uspto.gov/trademarks-application-process/filing-online/trademark-application-fee-structure; USPTO, Trademark Fee Information, https://www.uspto.gov/trademarks-application-process/filingonline/trade-mark-application-fee-structure. Indeed, in FY 2016, the federal government collected $146.1 million in revenues from registrations. *See* USPTO, 2016 PERFORMANCE AND ACCOUNTABILITY REPORT 42 (2016).

None of the subsidy or union cases cited by the Solicitor General involved a citizen paying the federal government. *See* U.S. Br.15-18, *citing Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) (federal tax exemptions); *Rust v. Sullivan*, 500 U.S. 173 (1991) (federal family-planning funds); *NEA v. Finley*, 524 U.S. 569 (1998) (federal arts grants); *United States v. American Library Ass'n*, 539 U.S.

194 (2003) (federal library funding); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007) (use of payroll deduction by union of public employees to collect agency-shop fees); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009) (same as *Davenport*). While the government does have some power to condition uses of its own funding and subsidies disbursed—thereby attaching strings to its purse—to people in ways that burden their speech, no such power exists where the government itself is collecting funds from citizens—particularly where, as here, it involves access to a limited public forum. *See Rust*, 500 U.S. at 198-99 (differentiating government's legitimate exercise of "public fisc" versus speech restrictions of a public forum). The First Amendment still applies.

Federal registration of trademarks is also not the government speaking. The nationwide expression of ownership of a registered mark, along with the underlying mark and assertions of priority, are made by the registrant, *not* by the government. *Cf. Walker*, 135 S. Ct. at 2251 (holding state license plates were not limited public forum because government owned "each specialty plate design"). No one can reasonably think that a federally registered trademark—such as BOB DYLAN ®—is the government itself speaking. Indeed, the historical practice of the Trademark Office expressly rejected the notion that federal registration should be viewed as the Office's "endorsement" or "imprimatur" backing the underlying trademark. *See In re Tam*, 808 F.3d 1321, 1347 (Fed. Cir. 2015) (en banc) (citing *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1219-20 n.3 (T.T.A.B. Mar. 3, 1993)); Jeffrey Lefstin, Note, *Does the First*

Amendment Bar Cancellation of Redskins?, 52 STAN. L. REV. 665, 684 (2000) ("both the Court of Customs and Patent Appeals and the Trademark Trial and Appeal Board have unequivocally rejected the notion that trademark registration connotes government imprimatur").

Indeed, if the system of federal registration were considered the federal government speaking, the consequences would be dire. All sorts of controversial trademarks (such as the ones mentioned above in section A) would now be considered the speech of the federal government, with its official backing. Even the controversial name and logo of the Sons of Confederate Veterans—the very subject matter Texas rejected for a specialty license plate in *Walker*, 135 S. Ct. at 2243-44—would be considered the speech of the federal government. Both the name and the logo of the Sons of Confederate Veterans, including the symbol of the confederate flag—have long been federally registered marks. *See* SONS OF CONFEDERATE VETERANS 1896 (Reg. No. 2764268, registered in 2003); SONS OF CONFEDERATE VETERANS (Reg. No. 4130767, registered in 2012). To characterize these federal registrations as the federal government's own speech is, put simply, untenable.

The parade of horribles the Petitioner imagines in allowing offensive trademarks to be federally registered has not materialized, notwithstanding the numerous arguably offensive trademarks already registered. *See* U.S. Br. 10-11. The marketplace of ideas, as well as the economic market (such as consumer boycotts and public shaming), provides the constitu-

tionally permissible antidote to offensive words used as trademarks. *See generally N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks..."). Consumers and the public at large have the power to persuade registrants of offensive marks "that they are wrong." *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

CONCLUSION

The decision of the Federal Circuit should be affirmed.

Respectfully submitted.

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Appendix A. Top 50 Artists by Certified Sales with Registered Trademarks*

* indicates multiple ®s but only earliest one is listed

Rank in sales (certified)	Artist	Registered Trademark No.
1	The Beatles	1752120*
2	Elvis Presley	1342551*
3	Michael Jackson	1908209*
4	Madonna	none
5	Elton John	none
6	Led Zeppelin	2212548*
7	Pink Floyd	2194702*
8	Rihanna	3621108*
9	Mariah Carey	2024932*
10	Celine Dion	2850587*
11	AC/DC	2721830*
12	Whitney Houston	4636296*
13	Queen	none
14	The Rolling Stones	3853613*

15	ABBA	3862613*
16	Taylor Swift	3809274*
17	Garth Brooks	2443657*
18	Eminem	2544555*
19	Eagles	none
20	U2	1820220*
21	Billy Joel	1233992*
22	Phil Collins	none
23	Aerosmith	1552802*
24	Frank Sinatra	1817035*
25	Barbra Streisand	2225638*
26	Kanye West	3648799*
27	Bruce Springsteen	1697409*
28	Bee Gees	1142133*
29	Lady Gaga	3960468*
30	Metallica	1923477*
31	Katy Perry	3682086*
32	Adele	4260010

33	Bruno Mars	4143492*
34	Justin Bieber	4396533*
35	Jay-Z	2485104*
36	Bon Jovi	1484670*
37	Lil Wayne	none
38	Rod Stewart	none
39	Britney Spears	2302300*
40	Fleetwood Mac	1238825*
41	Guns N' Roses	1762599*
42	George Strait	2039665
43	Backstreet Boys	3896747
44	Neil Diamond	2607316
45	Prince	2151863
46	Paul McCartney	2407693*
47	Kenny Rogers	1199918*
48	Janet Jackson	3046492*
49	Julio Iglesias	none
50	Chicago	1006059